IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1543

UNITED STATES OF AMERICA, Petitioner

v.

SYLVIO J. GRASSO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 552 F.2d 46. The opinion of the district court (Pet. App. C) is reported at 413 F.Supp. 166.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 9, 1977. On March 30, 1977, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including May 8, 1977. The petition was filed on May 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a defendant whose first trial is terminated by the court's erroneous sua sponte declaration of a mistrial is barred from raising the defense of double jeopardy upon retrial either because (i) he did not explicitly state an objection on the record immediately following the unexpected mistrial declaration, or (ii) prior to the declaration of a mistrial he filed a motion for dismissal of the indictment on a ground not available in advance of trial which would have finally terminated the proceeding in his favor.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * * .

STATEMENT OF THE CASE

The essential facts are set forth in the majority opinion of the court of appeals (Pet. App. A 2a-4a):

> On April 16, 1975, appellee was indicted on three counts of income tax evasion for the years 1969, 1970 and 1971, pursuant to 26 U.S.C. § 7201. Trial began on November 4, 1975, before T. Emmet Clarie, Chief Judge, and a jury. During the next eight trial days the Government called over 40 witnesses, one of whom was a Daniel Harris; the defendant presented ten witnesses, including himself; the Government called three witnesses in rebuttal; over 300 documents were admitted as exhibits; and the parties filed extensive requests for jury instructions. On November 26, 1975, when only the Government's final rebuttal witnesses remained to be heard, Judge Clarie declared a mistrial on his own motion after a two-day hearing.
>
> The mistrial was precipitated by a recantation by Government witness Harris, a multiple offender then serving a term of imprisonment of eight to thirty years imposed in 1971 for the sale of heroin. He had received favorable consideration from the Board of Parole and was to be released from prison in December, 1975. His direct testimony was to the effect that he and the appellee, Grasso, had engaged in numerous transactions involving the sale of heroin in the year 1970. The testimony thus established

an illegal source for the appellee's alleged unreported income in that calendar year. Harris's testimony did not relate to the tax years 1969 or 1971. His testimony lasted a day and a half and consumed over 120 pages of transcript.

Several days after Harris had testified, he contacted the appellee's son, who in turn advised him to contact the court or appellee's counsel, Henry Rothblatt. Harris telephoned Judge Clarie's law clerk and asked him to tell Rothblatt to call "Dan" at a given number. Rothblatt proceeded to interview Harris at the local jail where he was being held, and tape-recorded a full recantation of Harris's trial testimony. The recanting witness stated that his false testimony was influenced by threats made by Government prosecutors and Internal Revenue Service agents in charge of the tax case, the alleged threats being that his parole would be revoked, that he would have to serve the full 30 years of his sentence, and that he might in addition be indicted on a perjury charge because of his previous grand jury testimony in the instant case.

Rothblatt immediately informed the court of Harris's recantation and filed a motion to dismiss based on prosecutorial misconduct. See, e.g., Giglio v. United States, 405 U.S. 150 (1972). Hearings were held outside the presence of the jury, with ten witnesses testifying, but Harris refused to testify, relying on the Fifth Amendment. Judge Clarie declared a mistrial on the basis that the defendant Grasso could "not get a fair and impartial trial under the present circumstances," since "the issue would become whether or not he was selling narcotics, and whether or not . . . Harris could be believed," rather than whether or not Grasso evaded taxes. In Judge Clarie's view there was a "manifest necessity for declaring a mistrial" so that "the ends of justice, public justice, would [not] be defeated." Judge Clarie found

> no improper conduct on the part of the prosecutors or Government agents. He explicitly stated that "the issue of double jeopardy could be argued" in the event the Government decided to proceed with a retrial. The Assistant United States Attorney recorded his objection to the declaration of mistrial "for the record." For the defense Mr. Rothblatt said: "Of course, your Honor, the defendant agrees with everything that your Honor has decided, except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal." 1/

The government sought to reprosecute, and respondent promptly filed a motion to dismiss the indictment on the ground of double jeopardy which Chief Judge Clarie assigned to Judge Robert C. Zampano for disposition (Pet. App. C 34a). Judge Zampano granted the motion.

Applying the double jeopardy principles established by

1/ The oral ruling of Judge Clarie (excluding a portion where he discussed his belief that the principal cause of the mistrial was the failure of an attorney who was assigned to represent the witness Daniel Harris to immediately advise the court of Harris' initial unwillingness to testify at the trial) is reproduced in the opinion of the district court (Pet. App. C 29a-32a). The complete ruling, and counsels' arguments on the motion to dismiss the indictment, appear in the appendix filed by the government in the court of appeals at pages A23-A41 [hereinafter referred to as "C.A. App."].

this Court, and noting that sua sponte declaration of a mistrial "contemplates a sound and sensitive exercise of discretion by the trial judge which must be tested on a case by case basis" (Pet. App. C 35a), Judge Zampano listed several reasons for his decision that retrial would violate the Double Jeopardy Clause.

First, the district court held that contrary to the government's suggestion, respondent did not request a mistrial. The presentation of the motion to dismiss, the arguments of counsel, the ruling of Judge Clarie, and the reaction of the attorneys immediately following the announcement of a mistrial, "disclose conclusively that the only motion offered or intended to be offered was the motion to dismiss" (Pet. App. C 36a). It was also found significant that during his oral ruling Judge Clarie twice noted that the principle of double jeopardy might be a relevant consideration in the event the government sought to reprosecute, thus clearly indicating that he was granting a mistrial sua sponte, and that the defense of double jeopardy had not been waived (id., at 36a-37a).

Second, finding "that there was neither impropriety or misconduct on the part of defense counsel during the events and proceedings surrounding the mistrial nor was the motion to dismiss a frivolous petition," Judge Zampano rejected the government's contention that any actions or conduct of respondent's counsel were calculated to abort the trial. He found no basis for implying consent to the mistrial ruling (Pet. App. C 37a).

Third, the court held that this case did not fall under the principle enunciated in Gori v. United States, 367 U.S. 364, 369 (1961), that retrial may be permissible where a sua sponte mistrial is declared "in the sole interest of the defendant." The court found that the mistrial prevented respondent from discrediting a key government witness and in all likelihood receiving an acquittal at least with respect to the 1970 tax year, and that in addition, the mistrial gave the government a solid tactical advantage upon reprosecution (Pet. App. C 39a-41a).

Judge Zampano also noted that this was a complex trial that had been aborted at a much later stage than other cases in which retrial has been permitted following sua sponte declaration of a mistrial. And finally, he observed that reprosecution would be particularly oppressive, and impinge upon the right to counsel and the right to a speedy trial, since the first trial and other criminal prosecutions recently instituted against respondent have "strained his financial resources to the limit" and left him substantially indebted and unable to further retain private counsel (Pet. App. C 41a).

The court of appeals affirmed (Pet. App. A 1a-17a), one judge dissenting (id., at 17a-25a).

The court found, as had Judge Zampano, that respondent neither requested a mistrial nor consented thereto (Pet. App. 5a). Defense counsel's remarks made immediately after the trial judge's ruling, while not an explicit objection, were held not to constitute affirmative consent to the mistrial (Id., at 5a-6a).

The court also agreed with Judge Zampano's finding that there was no basis in the record for implying consent to the mistrial based upon alleged conduct of respondent's counsel designed to precipitate a mistrial. The court described the government's argument as "farfetched" and "based purely on conjecture" (Pet. App. A 6a-9a).

Having found that the mistrial was declared sua sponte and without respondent's consent, either express or implied, the court indicated that the "manifest necessity" test first enunciated in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) was applicable to this case (Pet. App. A 9a). Applying this standard, the court held that in view of a number of obvious alternatives to a mistrial which the trial judge left unexplored, there was no manifest necessity, and the Double Jeopardy Clause therefore bars retrial (Id. at 13a-17a).[2/]

Judge Timbers, in dissent, voiced no disagreement with the majority's conclusion that there existed no manifest necessity for the mistrial. His principal contention was that respondent's counsel did not properly object following the sua sponte mistrial ruling and that this constituted an implied consent thereto (Pet. App. A 20a-21a).

2/ The court indicated that retrial would also be barred under the "sole interest of the defendant" test of Gori v. United States, 367 U.S. 364 (1961), because the mistrial prejudiced the defendant by preventing him from impeaching a key government witness and from generally claiming government misconduct in the case, while at the same time it provided the government with "a solid tactical advantage" upon reprosecution (Pet. App. A 10a n.1).

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RETRIAL IS BARRED UNDER THE DOUBLE JEOPARDY CLAUSE SINCE RESPONDENT NEITHER REQUESTED NOR CONSENTED TO THE MISTRIAL AND THERE WAS NO MANIFEST NECESSITY THEREFOR.

It is well established that the Double Jeopardy Clause prohibits retrial after a mistrial has been declared without the defendant's request or consent unless "there is a manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated." United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). See United States v. Dinitz, 424 U.S. 600, 606-607 (1976).

The government does not challenge the finding of both courts below that the mistrial in this case was not justified by manifest necessity.[3/] Nor does the government contend that respondent requested the mistrial, or that he expressly consented to it. The government's sole contention (advanced under a number of different theories) is that there was "implied" consent to the mistrial which should bar respondent from raising the defense of double jeopardy. None of the arguments in support of this contention has merit.

3/ In its petition, the government alternately describes the mistrial ruling as improper, erroneous and improvident (Pet. 11, 13).

A. The absence of an explicit objection after the declaration of a mistrial did not constitute implied consent thereto.

The government contends that respondent's "failure to explicitly object to the declaration of a mistrial should be taken as consent," so as to bar a subsequent claim of double jeopardy (Pet. 8).

However, this Court has never considered the presence or absence of such objection a significant factor in determining the permissibility of reprosecution following the declaration of a mistrial. Rather, the critical distinction has been between mistrials granted pursuant to the defendant's request or with his consent, and those granted by the court sua sponte. See, e.g., United States v. Jorn, 400 U.S. 470, 484-485 (1971).

As both courts below have found, the record plainly indicates that the mistrial in this case was declared sua sponte, and that respondent neither requested nor consented to it (Pet. App. A 5a; Pet. App. C 36a-37a). No amount of rhetoric can diminish the significance of this fact.

The court of appeals decisions cited by the government (Pet. 8 n.2, App. A 22a) do not support its argument that absence of an explicit objection amounted to implied consent to the mistrial and waiver of respondent's rights under the Double Jeopardy Clause. Most of the cited cases did not involve a true sua sponte mistrial situation, as a motion for a mistrial had been filed either by the defendant himself, United States v. Goldstein, 479 F.2d 1061 (2d Cir.), cert. denied, 414 U.S. 873 (1973); United States v. Pappas, 445 F.2d 1194 (3d Cir. 1971), or by a co-defendant United States v. Gentile, 525 F.2d 252 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976); Roberts v. United States, 477 F.2d 544 (8th Cir. 1973); Scott v. United States, 202 F.2d 354 (D.C. Cir.), cert. denied, 344 U.S. 879 (1952).

The remaining cases involved a deadlocked-jury situation where it was held that the defendant failed to sufficiently advise the trial judge of his desire for the deliberations to continue. United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975); United States v. Phillips, 431 F.2d 949 (3d Cir. 1970); United States v. Gordy, 526 F.2d 631, 635 & n.1 (5th Cir. 1976)(dicta).

In all of these cases the circumstances were such that the trial judge had reason to believe the defendant desired a mistrial. Without an affirmative statement advising the court that this was not the case, and that the defendant did not in fact desire a mistrial, consent could reasonably be implied.[4/]

4/ United States v. Sedgwick, 345 A.2d 465 (D.C. Ct. App.), cert. denied, 423 U.S. 1028 (1975), also cited by the government (Pet. 8 n.2, 12; App. A 22a), is distinguishable for another important reason. In that case, prior to declaring a mistrial the court consulted with defense counsel and suggested an alternative means of dealing with the problem that had arisen during trial. The mistrial was declared only after this alternative was rejected by the defendant, who insisted upon a dismissal. 345 A.2d at 472. Such discussion of alternatives is precisely what was not done here, and it is doubtful that Sedgwick is inconsistent with the decision below. See Pet. App. A 15a-16a.

In the present case, no party had requested a mistrial (it was never discussed at all) prior to the court's sua sponte declaration, and the circumstances did not otherwise obligate respondent to affirmatively note his nonacquiescence in the court's ruling. Moreover, at the time he declared the mistrial, the trial judge expressly stated that the double jeopardy issue could be argued later if the government decided to reprosecute (Pet. App. C 32a, 34a).[5/] As noted by the courts below (Pet. App. A 5a, App. C 36a-37a), this clearly confirms that the judge believed he was acting without respondent's consent. To require a more explicit objection under these circumstances (assuming arguendo there is such a requirement) would be to exalt form over substance. For it was already clear that the trial judge understood the defendant

5/ It is noteworthy that Judge Clarie referred to the potential double jeopardy problem twice, in very similar language, both before and after the statement of defense counsel -- "Of course, your Honor, the defendant agrees with everything that your Honor has decided except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal"--that the government erroneously construes as an indication of consent (Pet. 9 & n.4). The fact that there were two such references--one before and one after counsel's statement--clearly establishes that (1) the statement did not at all contribute to the judge's decision to declare a mistrial, and (2) the statement did not at all affect the judge's belief that his ruling created a double jeopardy problem.

position.[6/] Furthermore, it was clearly inappropriate for counsel to discuss double jeopardy considerations at that time in light of the judge's specific statement that such discussion was to be deferred.

B. The filing of a motion for dismissal of the indictment on the ground of prosecutorial misconduct did not constitute implied consent to the declaration of a mistrial.

Relying upon its central argument in Lee v. United States, 21 Cr.L. 3113 (U.S. June 13, 1977), the government contends that the filing of respondent's motion for dismissal of the indictment on the ground of prosecutorial misconduct, and the argument in support thereof, amounted to implied consent to the mistrial which bars a subsequent claim of double jeopardy (Pet. 9-10, 10-13).

In Lee, the defendant moved to dismiss an information on grounds it was facially defective after the prosecutor's opening statement at a bench trial. The court initially denied the motion, but later in the day, after all evidence had been presented, the judge reconsidered and granted the relief requested by the defendant. Thereafter, the prosecutor obtained a valid indictment and after a second trial the defendant was convicted. On appeal, the defendant's claim that retrial was barred under the Double Jeopardy Clause was rejected, and this Court recently affirmed that decision.

Essentially, the argument from Lee which the government seeks to apply here is that any request by the accused for an

6/ In response to defense counsel's statement (p.12 n.5, supra), which may seem somewhat ambiguous when read from a cold record, Judge Clarie simply responded (C.A. App. A35):

> THE COURT: I understand. The same ruling stands. Call the jury, Mr. Bailiff.

and then proceeded to inform the jury of the mistrial (id., at A35-A41).

order which will terminate an ongoing trial removes the double jeopardy bar to reprosecution. Both the nature and grounds of the requested relief, in the government's view, are irrelevant. (Br. 14-27).[7/]

While the Court held in Lee that retrial was not barred under the Double Jeopardy Clause, it clearly did not adopt the broad rule urged by the government. Quite the contrary, the Court emphasized that the grounds for an order terminating an ongoing trial are of critical importance (21 Cr.L. at 3115):

> The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution. See United States v. Jorn, 400 U.S. 470, 476 (1971) (plurality opinion), while a dismissal may or may not do so. Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins establishes that further prosecution is barred by the Double Jeopardy Clause.

In Lee, the defendant's motion to dismiss because of a technical defect in the information did not contemplate a final termination of the proceeding. The defect was one which could readily be cured, and there was "little doubt that the court granted the motion to dismiss . . . in contemplation of . . . a second prosecution," 21 Cr.L. at 3115. Thus the motion to dismiss was the functional equivalent of a mistrial request, and retrial was permissible.

7/ "Br." refers to the Brief for the United States in Lee v. United States, supra.

In the present case, the only relief requested by respondent was dismissal of the indictment (or entry of a judgment of acquittal) on the ground of prosecutorial misconduct (Pet. App. A 5a; Pet. App. C. 29a, 36a; C.A. App. A23-A26). In sharp contrast to a mistrial, the relief sought here would have finally terminated the prosecution in respondent's favor.[8/] Under such circumstances, there is no basis for equating respondent's motion with a request for mistrial so as to bar his subsequent claim of double jeopardy. For he took no action that was inconsistent with an interest and desire to have the empaneled jury, rather than any other, decide his fate. See United States v. Jorn, 400 U.S. 470, 484-485 (1971); compare United States v. Sanabria, 548 F.2d 1, 7 (1st Cir. 1976), cert. granted, No. 76-1040, June 27, 1977.[9/]

C. There is no basis for implying consent to the mistrial based upon the conduct of defense counsel.

The government labels as "[a]nother factor of potential significance" the assertion that respondent's counsel contributed to the declaration of a mistrial by failing to cross-examine

8/ See Fong Foo v. United States, 369 U.S. 141 (1962); United States v. Means, 513 F.2d 1329 (8th Cir. 1975); cf. United States v. Jenkins, 420 U.S. 358 (1975). Although unnecessary here, it could even be argued that request for a mistrial on the ground of prosecutorial misconduct does not bar a subsequent double jeopardy claim. Cf. United States v. Jorn, 400 U.S. 470, 485 (1971); United States v. Dinitz, 424 U.S. 600 (1976).

9/ Obviously, the present case is also distinguishable from Lee because respondent's dismissal motion was filed immediately after the grounds therefor were manifest (Pet. App. C 29a), and because here there were a number of significant reasons why respondent had a very real interest in having the case go to the first jury rather than submitting to a retrial (id., at 39a-41a).

the perjurious government witness Daniel Harris concerning certain prior statements (Pet. 10). The argument is frivolous in light of the record, as indicated in the majority opinion below (Pet. App. A 6a-9a).[10/]

CONCLUSION

For the foregoing reasons, the petiton for a writ of certiorari should be denied.

Respectfully submitted,

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10/ Additionally, as noted above (p.5 n.1, supra), Judge Clarie, who presided at the trial, was of the opinion that certain conduct of the attorney assigned to represent Daniel Harris had actually precipitated the mistrial (C.A. App. A33-A34).